

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

TORONTO ASIA TELE ACCESS TELECOM INC., now known as TATA TELECOM INC., a company organized under the laws of Canada, and MANMOHAN SINGH THAMBER, a natural person residing in Canada,)	Civil Action No. C09-1356RSM
)	
)	PLAINTIFF'S MOTION FOR LEAVE TO AMEND AND WITHDRAW ADMISSIONS
)	
Plaintiffs,)	Note on Motion Calendar: January 21, 2011
)	
vs.)	
)	
TATA SONS LTD., a company organized under the laws of India,)	
)	
Defendant.)	

Plaintiff, Toronto Asia Tele Access Telecom Inc., now known as TATA Telecom, Inc. (hereinafter "Plaintiff" or "TATA Telecom"), for good cause shown herein moves this Court for leave to amend and withdraw certain admissions made in response to Tata Sons Limited's First Requests for Admission.

BACKGROUND

On March 31, 2010, Defendant, Tata Sons Limited (hereinafter "Defendant" or "Tata Sons") served its First Requests for Admission ("RFA") on Plaintiff, a true copy of which is

PLAINTIFF'S MOTION FOR LEAVE TO AMEND
AND WITHDRAW ADMISSIONS -- 1

No. C09 1356 RSM

HELEIN & MARASHLIAN, LLC
1420 Spring Hill Road, Suite 205
McLean, Virginia 22102
telephone (703)714-1300
facsimile (703) 714-1330

1 attached as **Exhibit B**. On April 28, 2010, Plaintiff served Defendant with Responses
2 (“Responses”) to the RFA, a true copy of which is attached as **Exhibit C**.

3 When the Responses were filed, Plaintiff was represented by Michael Atkins of Graham
4 & Dunn, PC. On September 17, 2010, Mr. Atkins moved to withdraw as Plaintiff’s counsel.
5 This Court granted his motion on November 2, 2010. The undersigned counsel was then
6 substituted as Plaintiff’s counsel.¹

8 Plaintiff’s corporate headquarters are in Toronto, Ontario, Canada. But its operations,
9 staff and management are located in Europe - the UK, Italy and Switzerland. Following its entry
10 into the case, undersigned counsel reviewed Plaintiff’s Responses, and soon thereafter learned of
11 the errors and inaccuracies contained therein. To understand the problems, undersigned counsel
12 communicated by phone and email with Plaintiff’s management. But, because of the time
13 differentials, significant language difficulties, and the heavy demands on management’s time and
14 resources, those communications did not provide as complete and as detailed a marshaling and
15 understanding of the facts as was needed. It was not until November 30, 2010, in Seattle, just
16 prior to the mediation session on December 1, 2010, that undersigned counsel was able to meet
17 with Plaintiff’s management. In these in-person meetings, undersigned counsel and Plaintiff’s
18 key personnel were able to fully discuss the facts on the background of the company, its
19 personnel and operations, and related facts of the case. It was at this time that counsel and
20 Plaintiff fully recognized and understood the inaccuracies contained in the Responses, namely,
21 some admissions were factually erroneous and others were based on speculation, or on an
22
23
24

25 _____
26 ¹ See Orders dated September 16, 2010.

1 incorrect understanding of certain terms and legal theories and the misrepresentations of a
 2 former employee.

3 In order to ensure Plaintiff's rights to a fair and impartial trial, the errors and inaccuracies
 4 of the Responses must be disclosed and corrected. This Motion seeks leave to correct those
 5 errors and inaccuracies by withdrawing, expanding and/or clarifying the Responses with the
 6 Proposed Amended Responses in **Exhibit A**.²

8 STANDARD OF REVIEW

9 Federal Rule of Civil Procedure 36(b) provides:

10 [T]he court may permit withdrawal or amendment [of responses to admissions] when the
 11 presentation of the merits of the action will be subserved thereby and the party who
 12 obtained the admission fails to satisfy the court that withdrawal or amendment will
 13 prejudice that party in maintaining the action or defense on the merits.

14 In interpreting these requirements, the Ninth Circuit has found, "two requirements must
 15 be met before an admission may be withdrawn: (1) presentation of the merits of the action must
 16 be subserved, and (2) the party who obtained the admission must not be prejudiced by the
 17 withdrawal." *Sonoda v. Cabrera*, 255 F.3d 1035, 1039 (9th Cir. 2001); *See also Orange Show*
 18 *Lincoln Mercury v. City of San Bernardino*, 978 F.2d 1265 (9th Cir. 1992). "The party who
 19 obtained the admission has the burden of proving that allowing withdrawal of the admission
 20 would prejudice its case." *Sodona*, 255 F.3d at 1039 (citing *Hadley v. United States*, 45 F.3d
 21 1345, 1348 (9th Cir.1995)).

25 ² See Shassheill Kumar's Verification of Response attached as **Exhibit D**, further supporting the above facts and
 26 arguments made herein.

1 The Ninth Circuit has also held that, “[t]he prejudice contemplated by 36(b) is not simply
2 that the party who obtained the admission will now have to convince the fact finder of the truth;
3 rather, it relates to the difficulty a party may face in proving its case, for example by the
4 unavailability of key witnesses in light of the delay.” *Sonoda*, 255 F.3d. at 1039.

5
6 In evaluating prejudice, courts look to the procedural posture of the case. And, “[c]ourts
7 are more likely to find prejudice when the motion for withdrawal is made in the middle of
8 trial...Once trial begins, a more restrictive standard is to be applied in permitting a party to
9 withdraw an admission, especially when the other party has ‘relied heavily’ on the admission.”
10 *Hadley*, 45 F.3d at 1348-49 (internal citations omitted).

11 **ARGUMENT**

12
13 As shown in more detail below, TATA Telecom meets Rule 36(b)’s requirements for the
14 withdrawal and amendment of certain Responses it provided. First, certain admissions were
15 simply wrong, some were improperly based on speculation, others were based on incorrect legal
16 terms of art, and some contained transcription errors. These errors were unintentional and
17 resulted from Plaintiff’s unfamiliarity with the discovery process in the U.S. and the imperfect
18 conditions for clear and understandable communications between Plaintiff and its former
19 counsel. Therefore, amending the Responses is necessary to assist this Court in resolving the
20 merits of the case and to avoid Defendant’s reliance on erroneous facts and information. The
21 Court’s policy aims to allow evidence that assists the fact-finder in resolving the case. *See Fed.*
22 *R. Evid. 402; Tome v. United States*, 513 U.S. 150, 174, (1995) (concurring opinion). Precluding
23 Plaintiff from revising its Responses to the RFA would prevent the Court and Defendant from
24 having access to all available facts in contradiction of this Court’s policy.
25
26

Furthermore, denying the proper amendments and withdrawal of admissions would unduly prejudice Plaintiff, unfairly forcing it to litigate facts that simply are untrue, inaccurate or muddled. Such a result would contradict the purpose of the Federal Rules of Civil Procedure generally, and in particular, Rule 26(e). Under these rules, parties are required to supplement erroneous discovery responses as soon as new information becomes available. Fed. R. Civ. Proc. 26(e). This requirement is also intended to protect the opposing party from being prejudiced by relying on erroneous information. Due process requires not only that the offering party be protected from prejudice resulting from erroneous information, but the ends of justice do not tolerate a determination based on erroneous information, the existence of which was due to innocent error and/or miscommunications. Grant of this Motion will rid the record of erroneous information and factual inaccuracies and serve the due process rights of both parties.³ For these reasons, and those specifically identified below, Plaintiff respectfully requests that this Court grant it leave to amend or withdraw the admissions identified in **Exhibit A**.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant it leave to amend its Responses to Defendant's First Requests for Admission to Plaintiff.

³ It is axiomatic that at this early juncture of the proceedings, no prejudice will befall Defendant. Time shows that Defendant could not have "relied heavily" on Plaintiff's initial admissions. *Hadley*, 45 F.3d at 1348-49. Moreover, discovery remains open until well into next year. As such, it would suffer no prejudice from a grant of Plaintiff's Motion. Instead, at this early stage of the case, granting the Motion can only serve to assist Plaintiff, Defendant, and the Court by providing access to full and accurate factual information.

1 RESPECTFULLY SUBMITTED this 6th day of January, 2011

2
3 HELEIN & MARASHLIAN, LLC

4 s/ Charles H. Helein

5 Charles H. Helein (Admitted *Pro Hac Vice*)

6 Email: chh@commlawgroup.com

7 Jacqueline Hankins, (Admitted *Pro Hac Vice*)

8 Email: jrh@commlawgroup.com

9 HELEIN & MARASHLIAN, LLC

10 1420 Spring Hill Road, Suite 204

11 McLean, VA 22102

12 Lawrence D. Graham, WSBA No. 25,402

13 Email: graham@blacklaw.com

14 Douglas A. Grady, WSBA No. 36,100

15 Email: grady@blacklaw.com

16 David A. Lowe, WSBA No. 25,453

17 Email: lowe@blacklaw.com

18 701 Fifth Avenue, Suite 4800

19 Seattle, WA 98104

20 T: 206.381.3300

21 F: 206.381.3301

22
23 Attorneys for Plaintiffs
24
25
26

PLAINTIFF'S MOTION FOR LEAVE TO AMEND
AND WITHDRAW ADMISSIONS -- 6

No. C09 1356 RSM

HELEIN & MARASHLIAN, LLC
1420 Spring Hill Road, Suite 205
McLean, Virginia 22102
telephone (703)714-1300
facsimile (703) 714-1330

CERTIFICATE OF SERVICE

I certify that on January 6, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kit Roth
FENWICK & WEST LLP
1191 Second Avenue, 10th floor
Seattle, WA 98101
T: 206.389.4522
F: 206.389.4511
kroth@fenwick.com

s/ Charles H. Helein

PLAINTIFF'S MOTION FOR LEAVE TO AMEND
AND WITHDRAW ADMISSIONS -- 7

No. C09 1356 RSM

HELEIN & MARASHLIAN, LLC
1420 Spring Hill Road, Suite 205
McLean, Virginia 22102
telephone (703)714-1300
facsimile (703) 714-1330